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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1946

No. 519

MECHANICAL FARM EQUIPMENT DISTRIBUTORS, INC. (a corporation),
Petitioner,

vs.

PAUL A. PORTER, Administrator of Office of Price Administration,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, Mechanical Farm Equipment Distributors, Inc., respectfully shows:

SUMMARY STATEMENT OF MATTER INVOLVED.

Petitioner is a dealer in farm machinery in the City of San Jose, California. Between the dates August 1, 1943, and September 25, 1943, petitioner sold certain used crawler type tractors to farmers for agricultural use by them on their farms and orchards. (R. 11.) The amended complaint charged that these sales were made at prices in excess of the maximum prices permitted under Maximum Price Regulation, No. 136 (7 Fed. Reg. 3198) (hereinafter referred to as MPR 136) and asked for damages of $17,656.11 and an injunction. (R. 2-5.) Petitioner plead as a defense (R. 10) and contended on the trial and appeal that the sales of crawler tractors to farmers did not come within the purview of MPR 136 since they were sales at retail and, as such, expressly excluded by the order from its operation. The District Court entered judgment against petititoner in the sum of $4,469.29 damages and an injunction. The sum of $3,733.96 was awarded by reason of the sales of crawler tractors to farmers. (R. 11; R. 16-22.) The Circuit Court of Appeals for the Ninth Circuit affirmed this judgment. The purpose of this petition is to obtain a review of the holding of the Circuit Court that sales of crawler tractors to farmers for agricultural use were subject to the provisions of MPR 136.

JURISDICTIONAL STATEMENT.

This action arises under the Emergency Price Control Act of 1942 (50 U.S.C. Sections 205(a) and 205(e), 56 Stat. 23) and Maximum Price Regulation No. 136 (7 Fed. Reg. 3198). Jurisdiction of the District Court was invoked under Section 205(c) of the Act. Jurisdiction of the Circuit Court of Appeals was invoked under Sections 128 and 129 of the Judicial Code. (28 U.S.C. Sec. 225 and 227.) Jurisdiction of this Court is invoked under Section 240 of the Judicial Code. (28 U.S.C. Sec. 347.)

Judgment was entered by the District Court on August 23, 1945. (R. 15-16.) The Circuit Court of Appeals for the Ninth Circuit entered judgment affirming the judgment of the District Court on June 24, 1946 (R. 110), and became final on that date.

MPR 136 in its pertinent portions provides:

"*Sec. 1390.1.* Definition of 'Machines and Parts' and 'Machinery services'. For the purpose of this regulation:

(a) The term 'machines and parts' means, and is limited to, products falling within the groups listed in Appendix A and Appendix B. Any other product is subject to the General Maximum Price Regulation, unless excluded therefrom or unless subject to some other specific regulation. * * *"

"*Sec. 1390.32.* Appendix A: Machines and parts to which the October 1, 1941, date is applicable * * * (d) Construction and mining machinery, etc. * * * crawler and non-agricultural tractors."

Prior to July 29, 1943, Section 1390.2 of MPR 136 read in part as follows:

> "This regulation shall not apply to: * * * (f) Any sale or delivery at retail of a machine or part by a person other than the manufacturer thereof. For the purpose of this exclusion a sale or delivery is deemed to be 'at retail' (1) when made to an ultimate consumer other than an industrial, commercial or governmental user * * *."

On July 29, 1943, the Administrator issued Amendment 96 to MPR 136 (8 Fed. Reg. 10662) which added trucks, trailers and busses to the Regulation's coverage and by which Section 1390.2(f) was also changed to read as follows:

> "(f) Any sale or delivery at retail of a machine or part by a person other than the manufacturer thereof, *except that the sale or delivery at retail of automotive trucks, and busses (as described in Section 1390.33 (c) shall not be excluded from but shall be included by this regulation.* * * * For the purposes of this exclusion a sale or delivery is deemed to be 'at retail' (1) when made to an ultimate consumer other than an industrial, commercial or governmental user * * *." (Emphasis indicates language added.)

On July 10, 1943, petitioner received by mail from the San Francisco District Office of respondent a mimeographed letter enclosing a mimeographed list of questions and answers on farm equipment prices. (R. 71; Defendant's Exhibit H, R. 58-71.) The same enclosure was sent to petitioner's competitors. (R. 73.) The bulletin advised petitioner as follows (R. 68-69):

"31. Q. What regulation governs the sales of used crawler tractors to farmers by dealers?

A. A sale of a used crawler tractor by a dealer to a farmer would be considered a sale at retail and excluded from Maximum Price Regulation 136 and is placed under the General Maximum Price Regulation."

The bulletin contained similar interpretations as to sales of new crawler tractors to farmers (R. 63) and on farmer to farmer sales of used crawler tractors. (R. 71.) Interpretations to the same effect as received by petitioner were issued by other District Offices of respondent as early as January 9, 1943. (R. 86.) No notice of any contrary position was ever given by respondent to petitioner. (R. 57.)

On November 15, 1942, the Administrator issued an interpretation dealing with the applicability of the order to repair services on tractors (8 O.P.A. Service, p. 40:2018) as follows:

"Repair Service on Tractors. The Regulation (MPR 136) is applicable to repair services on industrial and crawler tractors, even though the tractors are used for agricultural purposes."

On September 1, 1943, the Administrator issued the following interpretation (Metal and Machinery Desk Book, p. 60:403):

"Crawler type tractors sold by one farmer to another. The sale of crawler tractors by one farmer to another is subject to the regulation. Such a sale is not a sale 'at retail' except pursuant to Section 1390.2 (f), because a farmer is a com-

> mercial user. A farmer is considered a commercial user, since he operates his farm as a commercial activity and purchases the equipment for use in carrying out that activity."

This interpretation was issued after the sales involved in this case had commenced but before all were concluded. (R. 16-21.)

The Circuit Court of Appeals held that the language of Section 1390.2(f) was not clear, that the Administrator's intention with respect thereto was not shown by his Amendment 96 thereto and the extended construction thereof by his District Office subordinates and, relying entirely upon the interpretations of November 15, 1942 and September 1, 1943, determined that these latter expressions were of controlling weight and not inconsistent with his earlier interpretation or with the language of the Regulation. The decision of the Circuit Court gave an effect to the interpretation of September 1, 1943, whereby the price regulation covering sales of machinery to farmers was shifted from the General Maximum Price Regulation to MPR 136. The holding of the Circuit Court is directly contrary to its own holding in the case of *F. Urie & Co. v. Bowles* (C.C.A. 9th), 152 F. (2d) 713, is in conflict with the decision of this Court in the case of *Terrace v. Thompson,* 263 U. S. 197, and misapplies the rule of *Bowles v. Seminole Rock & Sand Co.,* 325 U. S. 410.

QUESTIONS PRESENTED.

(1) Does not the phrase "industrial, commercial or governmental" in MPR 136 plainly exclude the agricultural under well settled rules of construction?

(2) Does not Amendment 96 to MPR 136 clearly indicate the intention of the Administrator that the phrase was to bear its settled judicial meaning?

(3) Does not the action of the Administrator in permitting interpretations to issue to the trade from his district subordinates in accordance with the settled meaning without amending the order to the contrary coupled with his amendment to the order which would have no meaning unless such settled construction were intended, deprive his interpretation to the contrary of effect?

REASONS RELIED UPON FOR ISSUANCE OF THE WRIT.

A judgment which holds a citizen liable in damages for violating a regulation by reason of an administrative interpretation which is in conflict with the plain language of the regulation should not be permitted to stand. There is and must be a limit beyond which interpretation must bow to language of the regulation.

The Administrator should not be judicially permitted to adopt language of settled construction, act in accordance with such construction and permit his subordinates to so advise an industry and then retroactively seek to change his stand by contrary interpretation.

The holding of the Circuit Court of Appeals misapplies the rule of *Bowles v. Seminole Rock & Sand Co.*, 325 U. S. 410, 414 and conflicts with the decisions of this and other courts, State and Federal, insofar as it holds that the phrase "industrial, commercial or governmental" does not have a plain meaning. See *Terrace v. Thompson,* 263 U. S. 197; *U. S. v. Public Service Co.* (C.C.A. 10th), 143 F. (2d) 79; *State v. Smith* (Supreme Court of Missouri), 111 S. W. (2d) 513.

The questions presented are substantial and important both to the Administrator in the exercise of his powers and to all persons whose businesses are subject to price regulation.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that Court to certify and to send to this Court for its review and determination a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, "No. 11,227, Mechanical Farm Equipment Distributors, Inc., a corporation, appellant, v. Paul A. Porter, Administrator of Office of Price Administration, appellee", and that said judgment of the United States Circuit Court of Appeals for the Ninth Circuit may be reversed by this honorable Court insofar as the same awards damages or an injunction under Maximum Price Regulation No. 136, and that your peti-

tioner may have such other and further relief in the premises as to this honorable Court may seem just.

Dated, Palo Alto, California,
September 11, 1946.

MECHANICAL FARM EQUIPMENT DISTRIBUTORS, INC. (a corporation),
Petitioner,
By S. HASKET DERBY,
Attorney for Petitioner.

NATHAN C. FINCH,
Of Counsel.

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MECHANICAL FARM EQUIPMENT DISTRIBUTORS, INC. (a corporation),
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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

COURT OF APPEALS DECISION.

The opinion of the Circuit Court of Appeals is reported in ..... F. 2d ..... and is set forth in the record at page 102 et seq.

JURISDICTION.

The decision of the Circuit Court of Appeals in this case was rendered and became final on June 24, 1946.

STATEMENT OF CASE.

A full statement of the case as set forth in the petition and in the interest of brevity will not be repeated.

SPECIFICATION OF ERRORS.

A full statement of the errors committed by the Circuit Court of Appeals has been set forth in the petition and will not be repeated in the brief.

ARGUMENT.

SUMMARY OF ARGUMENT.

Point A. The phrase "industrial, commercial or governmental" in Section 1390.2 (f) of MPR 136 plainly excludes the agricultural.

Point B. The Administrator used the exclusionary phrase quoted with full knowledge of its settled meaning and with the intention that such was to be its construction.

Point C. The interpretations of the Administrator relied upon by the Circuit Court are inadmissible to vary the plain language of the Regulation. A status created by regulation may be changed only by regulation and not by an "interpretation".

A.

THE PHRASE "INDUSTRIAL, COMMERCIAL OR GOVERNMENTAL" IN SECTION 1390.2 (f) OF MPR 136 PLAINLY EXCLUDES THE AGRICULTURAL.

Section 1390.2 (f) of MPR 136 excluded from its operation sales made to an ultimate consumer other than an "industrial, commercial or governmental user". In a broad sense commercial includes industrial and vice versa, being synonymous with trade or business. In a narrow sense neither word includes the other and neither includes the agricultural. Where the words are used in juxtaposition, as in the phrase in Section 1390.2 (f), each word should be given a restricted meaning as mutually exclusive under the rule that the expression of one thing is the exclusion of another. The above rules are applied in the cases hereinafter cited dealing with the quoted phrase or others substantially similar.

In *Terrace v. Thompson,* 263 U.S. 197, a state statute prohibited the leasing of land to Japanese aliens for agricultural purposes. The treaty between Japan and the United States permitted Japanese to lease land "for residential and commercial purposes." In holding that the statute did not conflict with the treaty this Court said, page 223:

> "The right * * * 'to lease land for residential and commercial purposes,' or 'to do anything incident to or necessary for trade' cannot be said to include the right to own or lease or to have any title to or interest in land for agricultural purposes. *The enumeration of rights to own or lease for other specified purposes impliedly negatives*

the right to own or lease land for these purposes." (Italics ours.)

In *U. S. v. Public Service Co.,* 143 F. (2d) 79, a tax was imposed upon electrical energy sold "for domestic or commercial consumption and not for resale". It was held that the tax did not apply to electricity sold to dairies to use in pasteurizing milk, the Court saying, page 81:

> "The term 'commercial' may have a broad or a narrow meaning. In its broad meaning it encompasses industrial enterprises or all business. In the narrow meaning of the term 'commercial' is included only those enterprises engaged in the buying and selling of goods. The legislative history of the Act would indicate that Congress was using the word 'commercial' in the restricted rather than the broad sense."

State ex rel. Kansas City Power & Light Co. v. Smith (Supreme Court of Missouri 1938), 111 S.W. (2d) 513 involved a tax imposed upon sales of electricity "to domestic, commercial or industrial consumers", a phrase practically identical with that used by the Administrator in MPR 136. It was held that the tax did not apply to sales of electricity to a public service company to propel street cars or to a municipality to pump water. The Court said, page 515:

> "If 'commercial' is used in its broad sense, it included also the word 'industrial'. * * * If the word 'commercial' includes 'industrial', then why did the Legislature use the word 'industrial' also? We have already seen that every word should be

> given a meaning in construing a statute if possible; we therefore conclude that the word 'commercial' was not used by the Legislature with the intention of including the word 'industrial'. Both were used in the act, not in a broad sense, but, rather, in a restricted sense."
>
> * * * * * * *
>
> "The ordinarily accepted use of the phrase 'commercial establishment' denotes a place where commodities are exchanged, bought, or sold, while the ordinarily accepted meaning of the phrase 'industrial establishment' denotes a place of business which employs much labor and capital and is a distinct branch of trade; as, the sugar industry. Thus we see that the transportation of passengers would not come within the ordinary meaning of either the word 'commercial' or 'industrial'."

See also *Marks Co. v. United States,* 12 Ct. Customs App. 110 and *In re Yakima Fruit Growers* (Supreme Court of Washington), 146 P. (2d) 800.

The ordinary rules of construction, as applied in the above cases, should apply in this case. In *Schreffler v. Bowles* (CCA 10th), 153 F. (2d) 1, in holding the words "sell or deliver" not to be synonymous for the purpose of commencing running of the statute of limitations, the Court in upholding the Administrator's contention said, page 3:

> "It must be presumed that Congress used them according to their ordinary and usual accepted meaning. Otherwise there would have been no need to include them both in the Act."

Cases holding that farming is a "trade or business" within the meaning of the Act, authorizing suit by the Administrator such as *Speten v. Bowles,* 146 F. (2d) 602 and *Bowles v. Trullinger,* 152 F. (2d) 191, have no application to the construction of the phrase "industrial, commercial or governmental". While farming may be a trade or a business, it is not a commercial trade or business or an industrial trade or business. The choice by the Administrator of the restricted phrase, rather than the adoption of the broad language of the Act convincingly indicates that he knowingly selected the language he used.

B.

THE ADMINISTRATOR USED THE PHRASE "INDUSTRIAL, COMMERCIAL, OR GOVERNMENTAL" WITH FULL KNOWLEDGE OF ITS SETTLED MEANING AND WITH THE INTENTION THAT SUCH WAS TO BE ITS CONSTRUCTION.

If the intention of the Administrator is not clearly disclosed by the language of Section 1390.2 (f) of the Regulation, his conduct during the year 1943 prior to September 1 of that year is sufficient to resolve any doubts.

By Amendment 96 to MPR 136 (8 Fed. Reg. 10662) busses and trucks were, for the first time, placed under the coverage of the Regulation. If, as the Administrator now contends, he then intended that the words "industrial" and "commercial" should each have a broad meaning including each other as well as all activity engaged in for monetary gain, it is

virtually impossible to conceive of any sale of a truck or bus which would be a retail sale as defined in Section 1390.2 (f), since trucks and busses are purchased only for business use. If, on the other hand, the Administrator intended that the words "industrial" and "commercial", as used in Section 1390.2 (f), to have a restricted meaning, it was obvious to him that under the case of *State v. Smith,* 111 S.W. (2d) 513 (supra), sales of busses to transportation companies would be retail sales excluded from the Regulation; likewise under the holding of *Terrace v. Thompson,* 263 U.S. 197, supra, that sales of trucks to farmers would not be within the Regulation. If the latter were not his construction of the phrase which he used in Section 1390.2 (f) the addition to that section by Amendment 96 of the words

> "except that the sale or delivery at retail of automotive trucks, trailers and busses * * * shall not be excluded from but shall be covered by this regulation"

is completely meaningless. It is presumed that the Administrator's words are not meaningless.

We may go further and say that if the construction of the retail exclusion clause adopted by the Circuit Court of Appeals is correct, then the clause as a whole was practically meaningless. Reference to MPR 136 shows that few, if any, of the products which it covers are capable of sale for any purpose other than in the business of the purchaser. If the holding of the Circuit Court in this case is upheld it follows that the Administrator not only wasted his time in drafting

the exclusion but also that he wasted his time in subsequently amending it, since it never excluded anything.

The District Offices of the Administrator understood that the exclusion of Section 1390.2 (f) was not meaningless. As early as January 9, 1943, they advised the industry that sales to farmers were not covered by MPR 136. (R. 86.) Petitioner and other members of the trade in Northern California were so informed as late as July, 1943 (R. 58-71), the same month Amendment 96 was promulgated and less than one month before the sales involved in this case were commenced. The conclusion of the Circuit Court that the Administrator was not estopped by the interpretations of his District subordinates ignores the point. It was, and is, petitioner's contention, not that the Administrator was estopped, but that the interpretations of the District Offices were correct and that the conduct *of the Administrator* (not his District subordinates) in permitting such interpretations to issue for such a long period of time, coupled with the plain language of Section 1390.2 (f) and his interpretation thereof necessarily implied from Amendment 96, clearly shows that the intention of the Administrator was contrary to that for which he is contending in this case.

It would seem to admit of no doubt that if the prices charged by petitioner in this case violated the General Maximum Price Regulation (which they did not) and the Administrator had never issued his interpretation of September 1, 1943, a suit by the Ad-

ministrator based upon the petitioner's contentions in this case would have been upheld by the Courts as clearly authorized by the exclusion of the sales from MPR 136, the conduct of the Administrator above mentioned and the actual interpretation received by petitioner from the District subordinates.

C.

THE INTERPRETATIONS OF THE ADMINISTRATOR RELIED UPON BY THE CIRCUIT COURT ARE INADMISSIBLE TO VARY THE PLAIN LANGUAGE OF THE REGULATION. A STATUS CREATED BY REGULATION MAY BE CHANGED ONLY BY REGULATION AND NOT BY AN "INTERPRETATION".

It therefore appears that the only basis for the decision of the Circuit Court are the two interpretations of the Administrator relied upon in the opinion. Neither interpretation supports the decision.

The first interpretation, dated November 15, 1942 (8 O.P.A. Service p. 40:2018) provides:

> "The Regulation (MPR No. 136) is applicable to repair services on industrial and crawler tractors, even though the tractors are used for agricultural purposes."

This interpretation is cited by the Circuit Court for the proposition that the Administrator has consistently interpreted MPR 136 as covering sales to farmers. (R. 103-104.) The conclusion reached by the Circuit Court is erroneous and the cited interpretation is correct. MPR 136 covered both machinery sales and machinery services. Section 1390.2 of the

Regulation excludes certain sales and certain services from its operation. The exceptions dealing with machinery services are contained in Section 1390.2 (i) and cover repairs to public address systems, electric storage batteries, etc. The repair of tractors is not excepted and is therefore included. The exclusion involved in this case involves retail *sales* as specified in Section 1390.2 (f). We submit that the interpretation on repairs furnishes no clue to the Administrator's intent as to sales.

This leaves the judgment with but one basis for support, the interpretation of September 1, 1943, found in Metal and Machinery Desk Book, 60:403. That interpretation purports to rule that the sale of a crawler tractor to a farmer is not a sale at retail "because a farmer is a commercial user". If the interpretation is of "controlling weight" under the holding in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, it sustains the judgment. It should not be given such weight. The last cited case upholds only those interpretations which are not "plainly erroneous or inconsistent with the regulation," both of which tests are violated by the interpretation in question. This interpretation was not issued concurrently with the Regulation but at a far later date and after interpretations to the contrary had been given and action inconsistent therewith had been taken.

The effect of the interpretation of September 1, 1943, if valid, would be to retroactively change the regulation covering sales to farmers from the General Maximum Price Regulation to MPR 136. Such a change may be accomplished only by a regulation and

not by an interpretation (50 U.S.C. App. Sec. 902). The case of *F. Uri & Co. v. Bowles* (CCA 9th), 152 F. (2d) 713, expressly so holds, the Court saying:

> "But the problem here presented differs in a material aspect from the particular issue faced by the Court in the Seminole case. A reading of that case indicates that there both the regulations *and* the 'administrative construction' thereof were issued by the administrator concurrently. This is not the situation confronting us in this case. At the time of the alleged violation of the regulations (August 3, 1943) the administrative constructions relied on and strongly emphasized by appellee had not been promulgated by the Administrator. Appellants confronted *only* the regulations and the Statement of Considerations in the issuance of Amendment 12 * * * not the regulations and these later administrative constructions." (p. 715.)
>
> * * * * * * *
>
> "The Price Administrator is empowered to alter a status created by a prior regulation only by an order or another regulation (50 U.S.C.A. Appendix Sec. 902). * * * If the attempted interpretation of October 20, be regarded as a true interpretation of Amendment 12 it would have to relate back to May 26, 1943.

The gross injustice of such a later contradictory interpretation to merchants relying upon the Price Administrator's interpretation of May 26, given at the time of promulgation of Amendment 12, is equally obvious. It makes the Price Administrator say, in effect, that on May 26 these business concerns acquired a certain status by virtue of his interpretation, but on October 20, by a different interpretation they did not acquire

> it. * * * The Price Administrator's attempt failed because he can make such a change only by order or regulation." (pp. 718, 719.)

In this case two of the sales upon which the judgment is based were made in the month of August, 1943 and *before the interpretation of September 1, 1943 was issued.* (R. 18, sales to Antichi and Van Horn.) The only difference between the case last cited and the case at bar is that the prior interpretation there was express and in this case, if not express, it is necessarily implied. The distinction is without a difference. The decision of the Circuit Court in the case at bar is in square conflict with the same Court's holding in the case last cited.

CONCLUSION.

It is respectfully submitted that the judgment of the Circuit Court of Appeals has sanctioned a departure from the plain meaning of MPR 136 in a matter of importance to petitioner and others in the business of selling farm machinery and that it should be reversed.

Dated, Palo Alto, California,
September 11, 1946.

Respectfully submitted,
S. HASKET DERBY,
Attorney for Petitioner.

NATHAN C. FINCH,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 519

MECHANICAL FARM EQUIPMENT DISTRIBUTORS, INC., PETITIONER

v.

PAUL A. PORTER, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The district court rendered no opinion; its findings of fact and conclusions of law appear at pages 16–22 of the record. The opinion of the circuit court of appeals (R. 102–109) is reported at 156 F. 2d 296.

JURISDICTION

The judgment of the circuit court of appeals was entered on June 24, 1946 (R. 110). The petition for a writ of certiorari was filed on September 19, 1946. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code,

as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 347 (a)).

QUESTION PRESENTED

Whether the provision in Section 1390.1 (f) of Maximum Price Regulation No. 136, issued under the Emergency Price Control Act of 1942, as amended, exempting from the operation of that regulation sales of tractors by a non-manufacturer to "an ultimate consumer other than an industrial, commercial or governmental user," applies to sales of tractors made by a dealer to farmers.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the statute and regulations involved are set forth in the Appendix, *infra,* 11–15.

STATEMENT

Petitioner is a corporation organized under the laws of California, and is engaged in business in the City of San Jose, California, selling new and used farm equipment (8, 17, 22). On October 5, 1944, the Price Administrator filed an amended complaint against petitioner in the United States District Court for the Northern District of California, under Section 205 (e) of the Emergency Price Control Act, *infra,* pp. 11–12, alleging, among other things, that the petitioner had sold certain tractors at prices in excess of the lawful maximum prices permitted by Maximum Price Regulations Nos. 133 and 136, as amended and

revised (R. 2–5). Petitioner, in its answer, raised various defenses, including the defense that the sales made by it to farmers were not subject to Maximum Price Regulation 136, as alleged in the amended complaint (R. 10). The case was tried to the judge without a jury, and at the trial it was stipulated that the alleged purchases made from petitioner between August 1, 1943, and September 25, 1943, by the persons named in the stipulation, were made by farmers for use in the cultivation of the soil and in general farming and agricultural uses (R. 11), and that none of the purchases mentioned in the amended complaint were made for use and consumption other than in the course of trade or business (R. 12). The district court concluded that Maximum Price Regulation No. 136 was applicable to the sales mentioned in the amended complaint (R. 21), and after finding that petitioner had sold ten used tractors at prices in excess of those permitted by that Regulation, entered a judgment for single damages, including an injunction which enjoined petitioner from committing future violations of the regulations (R. 14–16). The circuit court of appeals affirmed, holding that Maximum Price Regulation No. 136 was applicable to the sales involved, and that the issuance of the injunction was proper (R. 109). The only error urged in the petition for a writ of certiorari is the alleged incorrectness of the ruling of the court below that Maximum Price Regulation No. 136 was ap-

plicable to the sales of tractors made by petitioner (Pet. 2).

ARGUMENT

Maximum Price Regulation No. 136 establishes maximum prices for a wide variety of machinery and parts, and Section 1390.2 thereof provides, among other exclusions, that the regulation shall not apply to:

> (f) Any sale or delivery at retail of a machine or part by a person other than the manufacturer thereof * * *. For the purposes of this exclusion a sale or delivery is deemed to be "at retail" (1) when made to an ultimate consumer, other than an industrial, commercial, or governmental user, * * *.

Petitioner contends that a farmer is not a "commercial * * * user" within the meaning of that term as used in this provision of the Regulation; that the sales made by it to farmers were made to ultimate consumers; and that Maximum Price Regulation No. 136 did not, therefore, apply to such sales.

It is clear, however, that the purpose of the exclusion was to remove from the operation of the Regulation only purchases made by an ultimate consumer for personal use, as distinguished from use in an economic enterprise. The Regulation covers the broad field of machinery and parts thereof. Obviously, some items of that nature (though not tractors) can be purchased for per-

sonal use, e. g., "electric storage batteries" or "radio and television apparatus and parts," which are covered in the Regulation (7 F. R. 3201). The exclusion was intended to remove only items of that character from the operation of the particular Regulation. The phrase "commercial, * * * user" is plainly broad enough to include those engaged in the economic enterprise of farming, just as the term "trade or business" appearing in Section 205 (e) of the Emergency Price Control Act has been uniformly held to be sufficiently comprehensive to include farming. See *Bowles* v. *Madl,* 153 F. 2d 21 (C. C. A. 10); *Bowles* v. *Rogers,* 149 F. 2d 1010 (C. C. A. 7); *Speten* v. *Bowles,* 146 F. 2d 602, 604 (C. C. A. 8), certiorari denied, 324 U. S. 877; *Bowles* v. *Trullinger,* 152 F. 2d 191 (C. C. A. 9). See also *American Medical Association* v. *United States,* 317 U. S. 519. Moreover, as the court below observed (R. 104), the official interpretations of Section 1390.2 of Maximum Price Regulation No. 136, show clearly that the term "commercial * * * user" appearing in that section was intended to include farming operations. The interpretation of November 25, 1942, held the regulation to be applicable to repair services on crawler tractors even though the tractors were used for agricultural purposes. See Pike and Fischer, *O. P. A. Service,* Vol. 8, p. 40:2018. The interpretation of September 1, 1943, specifically states that: "The sale of a crawler tractor by one farmer to another is subject to the Regulation. Such a sale is not a sale 'at retail,' except

pursuant to § 1390.2 (f), because a farmer is a commercial user. A farmer is considered a commercial user, since he operates his farm as a commercial activity and purchases the equipment for use in carrying on that activity." See Pike and Fischer, *O. P. A. Service,* Vol. 8, p. 40:2024.[1] A prior interpretation of July 7, 1943 also stated specifically that "the sale of a crawler tractor by one farmer to another is subject to the [Maximum Price] Regulation [No. 136]." See Pike and Fischer, *O. P. A. Metals* and *Machinery Desk Book,* Vol. 3, p. 60,653.[2] A construction placed by the Price Administrator upon his own regulation is of "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles* v. *Seminole Rock and Sand Co.,* 325 U. S. 410, 414. The construction placed on the regulation here involved by the Administrator is neither plainly erroneous nor inconsistent with the regu-

[1] Although the court below in the case of *Bowles* v. *Trullinger*, 152 F. 2d 191, 193, cited the interpretation at "Metal and Machinery Desk Book, 60:403," the correct citation of the interpretation is as herein shown.

[2] That the Price Administrator considered farming to be within the word commercial, and that he considered "commercial" and "trade or business" to be synonymous, is shown by his official interpretation of the latter term in connection with Maximum Price Regulation No. 133, covering farm equipment. That interpretation reads in part as follows:

"* * * Farm equipment purchased by a farmer is a purchase 'in the course of trade or business' since the farmer operates his farm as a commercial activity and purchases the equipment for use in carrying on that activity." (Pike and Fischer, *O. P. A. Metals and Machinery Desk Book*, Vol, 3. p. 65,182.)

lation.[3] The authorities cited and discussed by petitioner (Pet. 13–15) are not controlling here, since they but hold that a term like "commercial" may have a broad or narrow meaning according to the context in which it is found. See *Jordan* v. *Tashiro,* 278 U. S. 123, 127, wherein this doctrine was explicitly recognized by this Court, and applied to attain a result contrary to that reached in the cases relied upon by petitioner. A broad construction of the term "commercial" as used in the regulation here involved, is in harmony with the judicial construction, to which we have referred, of the statutory term "trade or business." In fact, the cases construing the latter term have referred to it as being synonymous with the term "commercial." See *Bowles* v. *Madl, supra,* at page 23; *Speten* v. *Bowles, supra,* at page 604. Nor is it significant, as petitioner suggests, that the Administrator happened to use a phrase different from "trade or business" to express the same thought. No sound reason is apparent why he should be restricted in the choice of his language any more than is the Congress. Cf. *Brook-*

[3] Nor is it impaired by the circumstance to which petitioner refers, that an amendment of July 29, 1943, specifically stated that sales at retail of certain automotive trucks and busses were subject to the regulation. As the court below observed, "In the face of the Administrator's clear statements of intention of November 25, 1942, and September 1, 1943, we cannot hold that appellant's finding of an implied intent in the above amendment is persuasive" (R. 106, footnote).

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lyn Savings Bank v. *O'Neil,* 324 U. S. 697, 712–713.

Petitioner asserts that certain advice which it received from the price specialist of the San Francisco district office of the Office of Price Administration to the effect that Maximum Price Regulation was not applicable to the sales of used tractors made by it to farmers, was a correct interpretation of that Regulation. Petitioner does not contend that the United States is estopped by that advice from urging a contrary interpretation. It is well established, of course, that in the absence of a statute to the contrary,[4] the United States may

[4] The amendatory provision which was added to Section 205 (e) of the Emergency Price Control Act by Section 12 (b) of the Price Control Extension Act of July 25, 1946 (Pub. Law No. 548, 79th Cong., 2d Sess.), is patently not applicable to this suit. The pertinent part of that provision reads as follows:

"The Administrator may not institute any action under this subsection on behalf of the United States, or, if such action has been instituted, the Administrator shall withdraw the same—

> "(1) if the violation arose because the person selling the commodity acted upon and in accordance with the written advice and instructions of the Administrator or any regional administrator or district director of the Office of Price Administration; * * *"

It will be observed that the advice received by petitioner in this case was given by a "price specialist," an officer subordinate in authority to and entirely different from any of the officers named in the statute. Moreover, it is apparent that petitioner did not act upon and in accordance with the advice received (R. 71–77).

not be estopped by erroneous interpretations announced by its officers. See *United States* v. *San Francisco,* 310 U. S. 16, 31–32; *Utah Power & Light Co.* v. *United States,* 243 U. S. 389. Furthermore, the Price Administrator has by the promulgation of Revised Procedural Regulation No. 1, *infra,* pp. 13–15, established a reasonable means through which sellers may obtain from designated Price Administration officers, official interpretations upon which the sellers may rely. Consequently, an interpretation obtained in a manner other than in accordance with this procedural regulation cannot be invoked by the seller as a defense to a suit of this character. See *Schreffler* v. *Bowles,* 153 F. 2d 1 (C. C. A. 10), certiorari denied June 10, 1946, No. 1124, October Term, 1945; *Bowles* v. *Indianapolis Glove Co.,* 150 F. 2d 597 (C. C. A. 7), certiorari denied, 326 U. S. 794; *Wells Lamont Corporation* v. *Bowles,* 149 F. 2d 364 (E. C. A.), certiorari denied, 326 U. S. 730. Moreover, petitioner apparently did not rely on the advice which it received from the San Francisco price specialist. The letter which it received from the price specialist stated that the General Maximum Price Regulation was applicable, rather than Maximum Price Regulation No. 136 (R. 68–69), but petitioner, after receiving the letter, continued to price its used tractors on the basis of the formulae set out in Maximum Price Regulation No. 136, and not in accordance with the provisions of the General Maximum Price Regulation (R. 71–77).

CONCLUSION

The decision of the court below is correct. There are no conflicts of decision, and the case does not call for review. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1946.

APPENDIX

1. Pertinent provisions of the Emergency Price Control Act of 1942 (56 Stat. 23), as amended by Stabilization Extension Act of 1944 (58 Stat. 632), 50 U. S. C. App. Supp. V., Sec. 901 et seq.

SEC. 205. (e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, *within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine:* Provided, however, *That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilfull nor the result of failure to take practicable pre-*

cautions against the occurrence of the violation.[1] For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; *and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price.*[2] If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer *either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period.* * * *[3]

2. Pertinent provisions of Maximum Price Regulation 136 (7 F. R. 5047, 7912; 8 F. R. 10662).

SECTION 1390.1. *Definition of "machines and parts" and "machinery services."* For the purpose of this Maximum Price Regulation No. 136, as amended:

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[1] As amended by sec. 108 (b) of Stabilization Extension Act of 1944. Formerly read, in place of italicized language: "* * * bring an action either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court."

[2] Added by sec. 108 (b) of Stabilization Extension Act of 1944.

[3] As amended by Sec. 108 (b) of Stabilization Extension Act of 1944. Formerly read, in place of italicized language: "* * * is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States * * *."

(a) The term "machines and parts" means, and is limited to, products falling within the groups listed in § 1390.32, Appendix A, and § 1390.33, Appendix B. Any other product is subject to the General Maximum Price Regulation, unless excluded therefrom or unless subject to some other specific regulation * * *.

* * * * *

SECTION 1390.2. *Exclusions.* This Maximum Price Regulation No. 136, as amended, shall not apply to:

* * * * *

(f) Any sale or delivery at retail of a machine or part by a person other than the manufacturer thereof, except that the sale or delivery at retail of automotive trucks, trailers and busses as described in § 1390.33 (c) shall not be excluded from, but shall be covered by this regulation. For the purpose of this exclusion, a sale or delivery is deemed to be "at retail" (1) when made to an ultimate consumer, other than an industrial, commercial, or governmental user * * *.

3. Pertinent provisions of Revised Procedural Regulation 1 (7 F. R. 8961, 8965, 8 F. R. 3313, 8 F. R. 11806).

SECTION 1300.51. *Interpretations.* An interpretation rendered by an officer or employee of the Office of Price Administration with respect to any provision of the Act or of any regulation, price schedule, order, requirement, or agreement thereunder, will be regarded by the Office of Price Administration as official only if such interpretation was requested and issued in accordance with § 1300.52 of this regulation. Action taken in reliance upon

and in conformity with an official interpretation and prior to any revocation or modification thereof or to any superseding thereof by regulation, order or amendment, shall constitute action in good faith pursuant to the provision of the Act, or of the regulation, price schedule, order, requirement or agreement to which such official interpretation relates. An official interpretation shall be applicable only with respect to the particular person to whom, and to the particular factual situation with respect to which, it is rendered, unless publicly announced as an interpretation of general application.

SEC. 1300.52. *Requirements governing interpretations.*—(a) *Requests for interpretations; form and contents.* Any person desiring an official interpretation of the Emergency Price Control Act of 1942 or any regulation, price schedule, order, requirement or agreement thereunder, shall make a request in writing for such interpretation. Such request shall set forth in full the factual situation out of which the interpretative question arises and shall, so far as is practicable, state the names and post office addresses of the persons involved. If the inquirer has previously requested an interpretation on the same or substantially the same facts, his request shall so indicate and shall name the official or office to whom his previous request was addressed. If the interpretation will affect operations of establishments located in more than one state, the request shall name the states in which the establishments are located. No interpretation shall be requested or given with respect to any hypothetical situation or in response to any hypothetical question.

(b) *Interpretation to be written; authorized officials.* Official interpretations shall be given only in writing, signed by one of the following officers of the Office of Price Administration: the Price Administrator, the General Counsel, any Associate or Assistant General Counsel, any Regional Attorney, any Regional Price Attorney, any State Attorney or State Price Attorney, any Chief Attorney or Chief Price Attorney for a District Office and any Chief Counsel of a Price Legal Branch of the National Office: *Provided,* That interpretations of general application shall be announced only by the Price Administrator, the General Council, any Associate or Assistant General Counsel, or any Regional Attorney.

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